Supreme Court of the United States.

No. 205.—October Term, 1904.

Edward Jaster, Senior, Plaintiff in Error, vs. F. M. Currie. } In Error to the Supreme Court of the State of Nebraska.

[April 24, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action brought by the plaintiff in error in Nebraska upon a judgment recovered by him against the defendant in error in Ohio. To this the defendant pleads that the plaintiff had brought a previous action in Nebraska for the same cause and afterwards served notice upon the defendant's attorney that the plaintiff's deposition would be taken in Ohio at a certain place on September 5, 1899, for use in the cause; that defendant was advised by his attorney to be present and went to Ohio for that purpose only; that the deposition was taken and the defendant then went to his father's house in the same county for the night of September 5, and that on September 8, in the early morning, being the earliest time convenient for leaving his father's for Nebraska, he took the train back. The writ in the Ohio suit was received and served on September 7. It is alleged that the notice to take the deposition was simply a ruse, and was given for the purpose of enticing the defendant into Ohio and for no other reason. There was a motion to set aside the service in the Ohio Court, which was overruled, 66 Ohio St. 661, but the defendant alleges that at that time he had not discovered what he styles the fraud perpetrated upon him. There was a general demurrer to this answer, which was overruled, and judgment was given for the defendant. This judgment was affirmed by the Supreme Court of Nebraska, Neb. , 94 N. W. Rep. 995, and thereupon the case was brought here on the ground that due faith and credit had not been given to the Ohio record, as required by Art. 4, § 1, of the Constitution of the United States. *Huntington* v. *Attrill*, 146 U. S. 657. *Jacobs* v. *Marks*, 182 U. S. 583.

The Supreme Court of Nebraska affirmed the judgment on the ground that in that State the distinction between actions at law and suits in equity had been abolished, that the decision in *Christmas* v. *Russell*, 5 Wall. 290, was limited to legal defences, 5 Wall. 304, 306, and that fraud would have been an equitable defence to the judgment in Ohio, and therefore was in Ne-

braska. We take up the question on this footing, without stopping to discuss the premises, which we find it unnecessary to do, and we will assume that on general demurrer a plea that the judgment was obtained by fraud would be a good equitable plea. See 5 Wall. 303.

It is assumed that the service of the writ in Ohio would have been good but for the alleged fraud. *Smythe* v. *Banks*, 4 Dall. 329. *Chaffee* v. *Jones*, 19 Pick. 260. That point must have been decided by the Ohio Courts. Moreover, the facts constituting the fraud are set forth and gain no new force from the vituperative epithet. If the inducement to enter the State of Ohio furnished by the notice to take a deposition there was made fraudulent by the motive with which the notice was given, then there was fraud, otherwise there was not. On the face of the answer fraud is simply the pleader's conclusion from the specific facts. The question is whether the motive alleged can have the effect supposed.

It will be observed that there was no misrepresentation, express or implied, with regard to anything, even the motives of the plaintiff. The parties were at arm's length. The plaintiff did not say or imply that he had one motive rather than another. He simply did a lawful act by all the powers enabling him to do it, and that was all. Therefore the word fraud may be discarded as inappropriate. The question is whether the service of a writ, otherwise lawful, becomes unlawful because the hope for a chance to make it was the sole motive for other acts tending to create the chance, which other acts would themselves have been lawful but for that hope. We assume that motives may make a difference in liability. But the usual cases where they have been held to do so have been cases where the immediate and expected effect of the act done was to inflict damage, and where therefore, as a matter of substantive law, if not of pleading, the act was thought to need a justification, see *Aikens* v. *Wisconsin*, 195 U. S. 194, 204, or else where the intent was to do a further and unlawful act to which the act done was the means. *Swift* v. *United States*, 196 U. S. 375, 396.

It is hard to exhaust the possibilities of a general proposition. Therefore it may be dangerous to say that doing an act lawful in itself as a means of doing another act lawful in itself cannot make a wrong by the combination. It is enough to say that it does not usually have that result, and that the case at bar is not an exception to the general rule. We must take the allegations of the answer to be true, although they are manifestly absurd. The plaintiff could not have known that the defendant's lawyer would advise him to go to Ohio, and that the defendant would go to his father's house, instead of to Nebraska, when his business was over. But we assume, as far as possible, that the anticipation of these things was the sole inducement for giving the notice and taking the deposition. Still the

notice was true, and the taking of the deposition needed no justification. It could be taken arbitrarily, because the plaintiff chose. On the other hand, the defendant could be served with process if he saw fit to linger in Ohio. That also the plaintiff could do arbitrarily, because he chose, if he thought he had a case. He arbitrarily could unite the two acts, and do the first because he hoped it would give him a chance to do the last.

Judgment reversed.

Mr. Justice McKenna and Mr. Justice Day concur in the result.

True copy.

Test:

Clerk Supreme Court, U. S.